

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARIA B. MADRIGAL**  
Claimant

VS.

**SCHWAN'S FOOD MANUFACTURING, INC.**  
Respondent

AND

**HARTFORD CASUALTY INSURANCE CO.**  
Insurance Carrier

Docket Nos. 1,020,288 &  
1,026,193

**ORDER**

Claimant requested review of the August 31, 2007 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on November 28, 2007.

**APPEARANCES**

D. Shane Bangerter, of Dodge City, Kansas, appeared for the claimant. Mickey W. Mosier, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found that the claimant was entitled to an 18.57 percent permanent partial impairment to the right upper extremity and a 17.57 percent permanent partial impairment to the left upper extremity, both in Docket No. 1,020,288.

In Docket No. 1,026,193, the ALJ concluded claimant established a compensable accident, but failed to sustain her burden of establishing an entitlement to an award of

either functional impairment or a permanent partial general (work) disability as a result of a series of accidents. Nevertheless, the ALJ did award the claimant reimbursement for the cost of her IME with Dr. Reiff Brown in the amount of \$450.00.

The claimant requests review of a variety of issues in both docketed claims. With respect to Docket No., 1,020,288, claimant takes issue with the ALJ's assessment of her permanent impairment. Claimant argues that the percentages found by the ALJ do not accurately or adequately reflect her impairments and the Award should be modified to reflect the opinions expressed by Dr. Brown.

As for Docket No. 1,026,193, claimant takes issue with nearly all of the ALJ's conclusions. Distilled to its simplest terms, claimant argues that she presented sufficient evidence to establish permanent impairment to her neck, back, shoulders, elbows and knees. And she argues that she is not only entitled to permanent impairment for those particular body parts, but she is entitled to a permanent partial general (work) disability as she was unable to continue working due to her injuries and respondent exhibited a lack of good faith in terminating her employment. Claimant contends the Award should be modified to reflect her substantial work disability.

Claimant also argues that the ALJ erroneously admitted the written decision of the Unemployment Compensation Judge and the Unemployment Security Board of Review's findings with respect to her termination.

Respondent maintains the ALJ correctly concluded that claimant's injury in the first docketed claim is limited to her bilateral upper extremities, although respondent argues the Award should be modified to reflect the impairment percentages imposed by Dr. Melhorn over those assessed by the ALJ. Respondent also contends that the evidence does not prove that the claimant suffered injury to any other part of her body in the second docketed claim. Moreover, the ALJ appropriately concluded that claimant failed to comply with the respondent's employment practices and as a result, was appropriately reprimanded and ultimately terminated thus defeating any potential work disability claim.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's recitation of the facts are detailed, accurate and supported by the record. Accordingly, it is not necessary to repeat those findings herein. The Board adopts the findings and legal conclusions of the ALJ as its own as if specifically set forth herein except as hereinafter noted.

Claimant asserts the ALJ erred at the Regular Hearing in admitting the unemployment records generated by the Unemployment Division Board of Review. The Board has considered this matter and finds the ALJ did, in fact, err in admitting those records.

K.A.R. 50-4-2, the regulation governing disclosure of unemployment records, provides in pertinent part as follows:

(4) Information shall be disclosed upon written request of either of the parties or their representatives for the purpose of administering or adjudicating a claim for benefits under the provisions of any other state benefit program if . . . :

(A) The written request is accompanied by a subpoena or order for records production from an administrative law judge or other official.

(B) The written request states that the requested information will not be released or published in any manner. The introduction of any information disclosed as evidence at a public hearing or as part of a record available to the public shall constitute publication.

Records introduced in a workers compensation case must be considered evidence at a public hearing as a record that is available to the public. The introduction into the workers compensation records, therefore, constitutes a publication and would be in violation of the above-quoted regulation. The Board concludes, even if the workers compensation case is considered to be a “state benefit program” the regulation would prohibit the introduction and disclosure of the record into the workers compensation proceedings. Accordingly, the ALJ erred in admitting the unemployment records. Nonetheless, the Board finds that it does not alter the ultimate outcome.

#### **Docket No. 1,020,288**

There is no dispute as to the compensability of this claim. The only controversy that remains is the nature and extent of claimant’s permanent partial impairment. The ALJ averaged the impairment ratings offered by Drs. Melhorn, Johnson and Zarr and assigned a 17.57 percent to the left upper extremity and 18.57 to the right for claimant’s bilateral upper extremity claim.

At oral argument and apparently for the first time during the pendency of this claim, claimant suggested that this claim involved more than just a bilateral carpal tunnel injury. Claimant further recommended that the Board merely consider all of the claimant’s injuries from both docketed claims as one for purposes of convenience. The difficulty with claimant’s suggestion is that claimant has specific evidentiary burdens to meet with respect to her claims and it is inappropriate to merely sweep all the physical impairments into one given those burdens and respondent’s defenses in this matter, particularly at this juncture of the claim.

More to the point, it is clear from the Regular Hearing transcript that this docketed claim was tried solely as a bilateral carpal tunnel claim. At the Regular Hearing, the ALJ inquired as to the nature of the claim and announced his understanding that this was a bilateral upper extremity claim, to which claimant's counsel agreed.<sup>1</sup> At oral argument before the Board respondent's counsel expressed his understanding, like the ALJ's, that this docketed claim involved solely the claimant's bilateral carpal tunnel complaints, nothing more.

The Board has reviewed the record as a whole and finds that Docket No. 1,020,288 deals exclusively with claimant's bilateral carpal tunnel complaints. The Board also finds that the ALJ's assessment of impairment in this claim should be affirmed. The ALJ merely averaged the opinions of the testifying physicians, excluding those expressed by Dr. Brown because there was no indication that his opinions were consistent with the principles set forth in the *Guides*<sup>2</sup>. Under these facts and circumstances, the Board finds this approach is reasonable and should therefore be affirmed.

#### **Docket No. 1,026,193**

This claim involves allegations of permanent injury to claimant's knees, shoulders, elbows, neck, back, buttocks, left middle and ring fingers caused by repetitive motion through July 12, 2004.<sup>3</sup> As explained in the ALJ's Award, during the period claimant was receiving treatment for her bilateral carpal tunnel complaints, she also experienced a series of acute onset injuries while serving in a series of accommodated positions throughout respondent's frozen pizza manufacturing plant. The ALJ summarized these claims as follows:

On December 1, 2004, [c]laimant reported to the nurses' station at [r]espondent's plant that she had bumped her right knee. On December 20, 2004 [c]laimant suffered a laceration to her right middle finger that required her to be taken for stitches. On February 16, 2005, [c]laimant reported to the nurses' station with low back and buttock pain from lifting boxes all day. Medical records maintained by [r]espondent are replete with complaints of pain in [c]laimant's neck, shoulders, knees and buttocks. Those records are silent as to any subsequent complaints in

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<sup>1</sup> R.H. Trans. at 4-5.

<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>3</sup> For purposes of convenience, the parties' agreed to July 12, 2004 as an accident date. However, claimant has testified to a series of individual, acute accidents on various dates and continued to work for respondent until August 2006, when she was terminated.

the right middle finger, and the knee complaints are bilateral – there is no specific complaint related to the reported “bumping” incident of December 1, 2004.<sup>4</sup>

As noted by the ALJ, none of these incidents are described either in the Application for Hearing or by claimant in her testimony.<sup>5</sup>

Respondent defends this claim first, by asserting that claimant failed to establish an accidental injury arising out of and in the course of her employment and second, by asserting that claimant failed to timely file her written claim.

The written claim defense was rejected by the ALJ as he concluded that claimant’s presentation of medical bills for a whole body scan and other electrodiagnostic studies constituted a written claim. The medical services were performed in January 2005 and the bill was presented to respondent in March 2005, within 60 days of the last rendition of medical care for claimant’s back, shoulder, knee and buttock complaints.<sup>6</sup> K.S.A. 44-520a requires a written claim to be served within 200 days of the date of accident or the last payment of compensation. And the furnishing of medical care constitutes compensation.<sup>7</sup> The Board has considered this issue and affirms the ALJ’s factual and legal conclusion. Claimant filed a timely written claim.

Claimant appears to argue that these individual accidents caused her to sustain injury or injuries which, as she worked, continued to be aggravated, a contention that respondent denies. As noted by the ALJ, claimant expressed ongoing complaints of pain in her neck, shoulders, low back and buttocks, relating these complaints to various physicians and to respondent’s plant nurse. As a result, she had a number of evaluations, including x-rays, a body scan, various MRI’s and electrodiagnostic studies to diagnose the cause(s) of those complaints and “to assess whether those complaints were derivative of cervical or lumbar spine injuries.”<sup>8</sup> He went on to note that while claimant was felt to have degenerative conditions in her spine consistent with her age, there was no competent medical opinion within the record that supported a work-related diagnoses in the cervical or lumbar spine.<sup>9</sup>

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<sup>4</sup> ALJ Award (Aug. 31, 2007) at 10.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 17.

<sup>7</sup> *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App.2d 383, 642 P.2d 574 (1982).

<sup>8</sup> ALJ Award (Aug. 31, 2007) at 5.

<sup>9</sup> *Id.*

As a result, the ALJ concluded that even though claimant's "complaints of pain" arose "during and as a result of [the] performance of her work activities,"<sup>10</sup> she nonetheless failed to come forward with sufficient evidence of permanent impairment of function.<sup>11</sup> The Board has carefully considered the ALJ's findings on this issue and concludes that it should be affirmed.

Claimant was evaluated by a number of physicians, three of whom testified. Dr. Melhorn treated claimant's bilateral upper extremities and while he rated those areas of her body for purposes of Docket No. 1,020,288, he did not assign any impairment ratings for claimant's neck, low back or shoulder complaints as he did not feel that those subjective complaints supported a rating under the *Guides*.<sup>12</sup>

At her attorney's request claimant was also evaluated by Dr. Reiff Brown and while he rated claimant's neck and back as well as her knee and one of her fingers, there is no indication within his report that his impairment ratings were issued pursuant to the 4<sup>th</sup> edition of the *Guides*, as required by K.S.A. 44-510e(a). Just as the ALJ did, the Board will disregard Dr. Brown's opinions as a result of this omission.

At respondent's request, Dr. James Zarr examined claimant and assigned an impairment to each of claimant's upper extremities for her bilateral carpal tunnel complaints. He also assigned impairments to claimant's neck (5 percent) and low back (5 percent) along with 1 percent to the right knee and an additional 12 percent impairment to each upper extremity for pain complaints in the elbows and shoulders. The problem with Dr. Zarr's testimony and his impairment ratings is that other than the upper extremity ratings for the bilateral carpal tunnel condition, the ratings are based solely on subjective complaints of pain, complaints that even he concedes "vastly outweigh the objective findings." And his testimony is silent as to how claimant's work activities caused or aggravated those conditions. The best that he offered on this point was to state that it was "possible" that claimant had pain secondary to the repetitive nature of her work causing work injuries.<sup>13</sup>

The ALJ appointed Dr. Michael Johnson to conduct an independent medical examination for purposes of rendering an impairment rating. Like Dr. Zarr, Dr. Johnson noted that claimant's subjective symptoms exceeded his objective findings. He went on to utilize the *Guides* and assigned a 40 percent impairment to claimant's right upper

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<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.* at 15.

<sup>12</sup> Melhorn Depo. at 25-26.

<sup>13</sup> Zarr Depo., Ex. 2 at 4 (Nov. 22, 2006 Report).

extremity and a 37 percent impairment to claimant's left upper extremity, both for the carpal tunnel complaints. He found no basis for assessing an impairment rating for the elbows, shoulders, neck, back or right knee, based on claimant's subjective complaints.<sup>14</sup>

After considering the record as a whole, including the physicians' testimony as well as that of claimant, the Board finds that claimant has failed to meet her evidentiary burden of establishing that she has a permanent impairment attributable to her alleged series of accidents. Like the ALJ, the Board finds that claimant's multiple complaints of pain developed during and as a result of her work activities, albeit by a bare margin. Nonetheless, she has testified that her complaints worsened while working. However, the greater weight of the evidence suggests that claimant has no permanent impairment attributable to her work-related injury or injuries (aside from the bilateral carpal tunnel complaints encompassed in Docket No. 1,020,288). Both the authorized treating physician and the court-appointed neutral physician failed to identify any ratable condition in the cervical or lumbar spine. While Dr. Zarr offered additional ratings for conditions other than the bilateral carpal tunnel, he was unable to testify to a medical probability that claimant had suffered those impairments as a result of repetitive work activity as claimant alleges. And like the ALJ, the Board is unwilling to consider the opinions offered by Dr. Brown because there is no evidence that he relied upon the *Guides* in preparing his ratings. Accordingly, the ALJ's Award in Docket No. 1,026,193 is affirmed.

Inasmuch as the Board has affirmed the ALJ's finding with respect to claimant's failure to meet her evidentiary burden regarding the alleged permanent impairments, the balance of the issues are moot. Claimant does, however, have the right to payment of her past medical treatment expenses and future medical benefits upon proper application as she established a compensable injury.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated August 31, 2007, is affirmed in part and modified in part.

The Award is modified with respect to the issue of the admittance of the unemployment records. Such records should not have been admitted into evidence.

In all other respects, the Award is affirmed.

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<sup>14</sup> Johnson Depo. at 8-9.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant  
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge